(19,268.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 208.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 11, 1904.

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Delaware, Lackawanna & Western Railroad Company, appellant, and The Commonwealth of Pennsylvania, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
2 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed in supreme court. Middle district. Mar. 2 1904 Olmsted & Stamm.

3 In the Supreme Court of the United States, October Term, 1903.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY
vs.
COMMONWEALTH OF PENNSYLVANIA. } No. —.

The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The Delaware, Lackawanna & Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 17th day of February, in the year of our Lord one thousand, nine hundred and four.

EDWARD D. WHITE,
Asso. Justice Sup. Court U. S.

Washington Febr'y 15th 1904.

Service of the above citation accepted. March 1st 1904.

HAMPTON L. CARSON,
Attorney-General, Pa.

3½ [Endorsed:] In the Supreme Court of the United States Delaware, Lackawanna & Western Railroad Company, plaintiff in error *v.* Commonwealth of Pennsylvania defendant in error Citation Filed in supreme court. Middle district. Mar. 2 1904 Olmsted & Stamm.

4 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to-wit:

Copy of Commonwealth Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 213 com. docket of 1900 is contained the following:

Appeal from the settlement of the auditor general and State treasurer.

Dec. 6, 1900. Appeal and specifications of objections filed.

Dec. 15, 1900. Bond filed.

April 13, 1901. Affidavits of F. F. Chambers, sec'y and treas., and W. H. Truesdale, pres't, filed.

April 13, 1901. Agreement of counsel filed reserving for determination of court question of defendant's liability to taxation in respect to capital stock representing coal located outside of Penna.

April 13, 1901. Trial ordered, jury called, came, etc., twelve good and lawful men of Dauphin county, all of whom having been sworn or affirmed do say that they find a verdict in favor of the Commonwealth for two thousand eight hundred seventy-four and sixty-seven one-hundredths ($2,874.67) dollars and costs.

April 29, 1901. Satisfaction filed.

May 28, 1901. Affidavit of F. F. Chambers filed.

May 28, 1901. Opinion of court filed directing judgment to be entered in favor of Commonwealth and against the defendant upon the reserved question for $9,883.71 unless exceptions be filed according to law. Same day defendant's points and answers of the court thereto filed.

May 29, 1901. Defendant's exceptions filed. Same day exceptions overruled and judgment entered in accordance with the opinion heretofore filed. To this ruling defendant excepts, and at its request exception sealed.

May 29, 1901. *Certiorari sur* appeal No. 18, May term, 1901, from supreme court received and filed.

May 29, 1901. Certified.

J. G. DIFFENDERFER,
Prothonotary.

In the Matter of the Account of the COMMONWEALTH OF PENNSYLVANIA against the DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, stated in its caption to be for tax on capital stock for the year ending the first Monday of November, 1899, said tax amounting to $242,350.00, and said account being dated May 9, 1900, a copy of said account being hereunto attached, and made part hereof.

The said Delaware, Lackawanna and Western Railroad Company, having paid or proposing to pay into the State treasury the sum of $100,000 on account, hereby appeals from the balance of said settlement of its account to the court of common pleas of Dauphin county, and files the following specifications of objection thereto, agreeably to the provisions of the act of assembly in such case made and provided:

1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them can be so construed, they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interests in railroads and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

3. The account hereby appealed from charges tax upon property, or upon capital stock representing property, "not within the
6 territorial limits of the authority levying the tax," and is for that reason, as well as others, in violation of section 1 of article IX. of the constitution of Pennsylvania.

4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective proportions of capital stock invested in and out of the State, and is, for that reason, in violation of section 1 of article IX. of the Constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States.

5. In settling accounts for the year 1899 against other transportation companies whose lines of railroad are partly within and partly without the State of Pennsylvania, the accounting officers of the Commonwealth have taxed only that proportion of the entire capital stock which their mileage in Pennsylvania bears to their entire mileage, but although a large part of the appellant's mileage of railroads is in the States of New York and New Jersey, without which railroads and the receipts derived therefrom its capital stock would be much less valuable, nevertheless, in the account appealed from the mileage basis has not been applied and no allowance whatever has been made on account of the ownership or interest of appellant in said railroads in other States, but tax has been imposed upon a valuation equal to the value of its entire capital stock with the amount of its funded debt added thereto and without any deduction or apportionment whatever. An unjust and illegal discrimination is thus made against appellant in violation of section 1 of article IX. of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

6. In settling accounts for the year 1899 against other transportation companies whose lines of railroad are partly within and
7 partly without the State of Pennsylvania, the accounting officers of the Commonwealth have taxed only that proportion of the entire capital stock which their mileage in Pennsylvania bears to their entire mileage, but although a large part of appellant's mileage of railroads is in the States of New York and New Jersey, without which railroads and the receipts derived therefrom its capital stock would be much less valuable, nevertheless, in the account appealed from the mileage basis has not been applied and no allowance whatever has been made on account of the ownership or interest of appellant in said railroads in other States, but tax has been imposed upon a valuation equal to the value of its entire capital stock with the amount of its funded debt added thereto and without any deduction or apportionment whatever. An unjust

and illegal discrimination is thus made against appellant in violation of section 1 of article XIV. of the amendments to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. A portion of the capital stock of appellant is invested in and represents shares of the capital stock of other corporations which are subject to and in their own names pay a tax upon their capital stock, including the shares held by appellant. The taxation of said shares to appellant, or the taxation of its capital stock representing said shares, is in violation of the first section of the act of June 8, 1891, amending section 1 of the act of June 1, 1889, and if enforced would result in double taxation, which is not contemplated nor authorized by any section of said act, or if authorized, is unconstitutional and void because in conflict with section 1 of article IX. of the constitution of Pennsylvania, and with section 1 of article XIV. of the amendments to the Constitution of the United States.

8. The attempted taxation of the corporation appellant upon shares owned by it in other corporations is in direct violation of the act of January 3, 1868, entitled "An act in relation to taxation upon stockholders of corporations."

8 9. The account is erroneous and illegal because therein tax is charged upon accounts and notes and bills receivable held by the company at its office in the city and State of New York against non-residents of the State of Pennsylvania, received by the company in exchange for coal sold and delivered to said non-residents at points without the State of Pennsylvania.

10. The account is erroneous and illegal because it includes tax upon railroad equipment owned by the company and used upon railroads wholly outside the State of Pennsylvania.

11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or any or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits.

12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Penn-

sylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits.

13. A portion of appellant's capital stock is invested in and represents in some instances the whole of the capital stock
9 and in other instances parts of the capital stock of corporations of other States whose franchises are derived from and exercised in said other States, and whose property is there located, wholly outside of the State of Pennsylvania. The shares representing said capital stock are held and owned by appellant at its general office in the city and State of New York. The attempted taxation by Pennsylvania of appellant upon or in respect of the said capital stocks or shares is in violation of a necessary implication of the Constitution of the United States which restricts the taxing power of each State to subjects within its territorial limits.

14. A considerable part of appellant's capital stock is invested in and represents coal lands and other real estate in Pennsylvania upon which appellant is subject to and pays annually all the county, city, borough, school, road, poor and other municipal and local taxes that are paid by owners of other real estate in the taxing localities in which the same is located, the local taxes thus paid by appellant upon real estate in 1899 amounting to more than $150,000. Without said real estate appellant's capital stock would be much less valuable. The account appealed from includes a State tax of five mills assessed upon said real estate, or the value thereof, for which tax there is no authority of law whatever. By the act of February 23, 1866 (P. L. 82), the legislature of Pennsylvania repealed the State tax on real estate theretofore existing, the fourth section of said act providing that "from and after the passage of this act the real estate of this Commonwealth shall be exempt from taxation for State purposes." Since that time there has been no legislation whatever imposing, or attempting, or purporting or intended to impose any State tax upon real estate within this Commonwealth, and the attempt of the Commonwealth to recover such tax from the appellant in the account hereby appealed from, is not only wholly without any statutory or other authority of law, but is an attempt to take the property of appellant without due process of law, and is in violation of section 1 of article XIV. of the amendments to the
10 Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

15. The real estate owned by appellant in Pennsylvania, and which constitutes the bulk of its assets, is subject to and appellant pays thereon the same county, city, borough, school, poor, road and other taxes which are paid upon similar property owned by individuals or partnerships or by corporations not having capital stock, said local taxes paid in 1899 amounting to $—. But real es-

tate in Pennsylvania owned by individuals or by partnerships or by corporations not having capital stock is not taxed for State purposes, and if any act of assembly can be found to warrant the imposition of a tax against this appellant upon real estate in Pennsylvania, or upon capital stock invested in and representing real estate, said act is unconstitutional and void because in conflict with section 1 of article IX. of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

16. The real estate owned by appellant in Pennsylvania, and which constitutes the bulk of its assets, is subject to and appellant pays thereon the same county, city, borough, school, poor, road and other taxes which are paid upon similar property owned by individuals or partnerships or by corporations not having capital stock, said local taxes paid in 1899 amounting to $—. But real estate in Pennsylvania owned by individuals or by partnerships or by corporations not having capital stock is not taxed for State purposes, and if any act of assembly can be found to warrant the imposition of a tax against this appellant upon real estate in Pennsylvania, or upon capital stock invested in and representing real estate, said act is unconstitutional and void because in conflict with section 1 of article XIV. of the amendments to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Harrisburg, Pa., July 7, 1900.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

(S'g'd) By its attorneys, M. E. OLMSTED,
(") A. C. STAMM.

Endorsement: No. 213 Commonwealth docket, 1900.—Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co.—C. S. '99.—Appeal from the settlement of an account by the auditor general and State treasurer.—Filed in the auditor general's office, the 7th day of July, 1900. (S'g'd) P. D. Bricker, for L. G. McCauley, auditor general.—Filed in the prothonotary's office, 6 day of Dec. 1900. (S'g'd) J. G. D., prothonotary.—M. E. Olmsted, A. C. Stamm, attorneys for defendant.

11 *Account.*

Delaware, Lackawanna and Western Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

To tax on capital stock for the year ended the first Monday of November, 1899, based upon the report and papers herewith filed.

Actual value in cash of capital stock, as appraised or valued by the officers of the company, and assessed for taxation, $48,470,000.

Tax at rate of five mills..... $242,350 00

Due Commonwealth..... $242,350 00

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *May* 9, 1900.

Settled and entered:
(S'g'd) L. G. McCAULEY,
Auditor General.

TREASURY DEPARTMENT,
HARRISBURG, PA., *May* 9, 1900.

Approved:
(S'g'd) JOHN E. STOTT,
For JAMES E. BARNETT,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *May* 10, 1900.

I hereby certify, that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office, the day and year aforesaid.

(S'g'd) JNO. A. GLENN,
For L. G. McCAULEY,
[SEAL.] *Auditor General.*

12 *Bond on Appeal.*

Know all men by these presents, that we, The Delaware Lackawanna and Western Railroad Company and Fidelity and Deposit Company of Maryland, of the city of Baltimore, and State of Maryland are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of two hundred eighty-four thousand, seven hundred and $\frac{00}{100}$ dollars ($284,700), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania, or her certain attorney or assigns, to which payment well

and truly to be made we do bind ourselves, and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company, and dated the 30th day of June A. D. 1900.

Whereas, the above bounden Delaware, Lackawanna and Western Railroad Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on capital stock for year 1899 amounting to $242,350.00 of which there has been paid or it is proposed to pay $100,000 on a/c leaving a balance of one hundred forty-two thousand three hundred fifty and $\frac{00}{100}$ dollars ($142,350\frac{00}{100}$), said account having been settled by the auditor general on the ninth day of May 1900 and approved by the State treasurer on the ninth day of May 1900.

Now the condition of this obligation is such that if the said Delaware, Lackawanna and Western Railroad Company shall prosecute its said appeal with effect, and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
(S'g'd) By W. H. TRUESDALE, *President.*

Attest:

[Seal of D. L. & W. R. R. Co. affixed.]

(S'g'd) FRED. F. CHAMBERS, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
(S'g'd) By JOSEPH A. FLYNN, [L. S.]
Attorney in Fact.

Attest:
(S'g'd) HUGH M. ALLWOOD, [L. S.]
Attorney in Fact.

[Seal of F. & D. Co. of Md. affixed.]

Signed, sealed and delivered in presence of
(S'g'd) W. R. MARSH.
(") J. R. KINGSLEY.

The security of the above bond is approved:

[Must be signed by a judge of some court in county where sureties reside.]

——— ———.

$1.80 in U. S. inter. revenue stamps affixed cancelled Jun-30, 1900.

12½ [Endorsed:] No. 213 Commonwealth docket, 1900. Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co. C. S. '99. Bond on appeal from the settlement of an account by the auditor general and State treasurer. M. E. Olmsted, A. C. Stamm, attorneys for defendant.

13 STATE OF NEW YORK, }
County of New York, } ss:

On the 30th day of June, in the year 1900, before me, personally came Joseph A. Flynn, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said Joseph A. Flynn, further said that he was acquainted with Hugh M. Allwood, and knew him to be the attorney-in-fact of said company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the said Hugh M. Allwood, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Joseph A. Flynn.

(S'g'd) ERNEST L. HICKS,
[NOTARIAL SEAL.] *Notary Public, New York County.*

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company in the city of Baltimore, State of Maryland, on the first day of June, 1898, at which was present a quorum of said directors, duly authorized to act in the premises, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven of the Code of Civil Procedure of the State of New York, Henry B. Platt, vice-president, or John W. Wooten, attorney, or Frank H. Platt, Theodore F. Wood, Edward T. Platt, Joseph A. Flynn
14 and Hugh M. Allwood, attorneys-in-fact of this company in the State of New York, be, and each of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of this company, and to attach thereto the seal of the corporation, the same to be attested by the said John W. Wooten, attorney of the company, or by either one of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, Hugh M. Allwood, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 30th day of June, 1900.

[Seal of Fidelity and Deposit Company of Maryland.]

(S'g'd) HUGH M. ALLWOOD,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement December 30th, 1899.

Resources.		Liabilities.	
Real estate	$600,000 00	Capital stock	$1,500,000 00
Stocks and bonds	1,539,977 00	Surplus and undivided profits	2,088,211 58
Railroad bonds	1,612,430 00	Premium reserve	612,189 33
Net premiums due	116,979 12	Claims in process of adjustment	6,935 72
Cash in bank, etc.	367,918 25	Claims reported: proof not filed	29,967 74
	$4,237,304 37		$4,237,304 37

STATE OF NEW YORK, *County of New York,* } *ss:*

Hugh M. Allwood, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 30th, 1899, to the best of his
15 knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

(S'g'd) HUGH M. ALLWOOD.

Subscribed and sworn to before me this 30" day of June, 1900.

(S'g'd) ERNEST L. HICKS,
[NOTARIAL SEAL.] *Notary Public, New York County.*

Endorsement: No. 213, Com'th docket, 1900.—Commonwealth *vs.* Delaware, Lackawanna and Western R. R. Co.—C. S. 99—Appeal bond.—Filed Dec. 15, 1900.—Dec. 15, 1900. The security of the within bond approved. By the court: (S'g'd) John H. Weiss, J.—M. E. Olmsted, A. C. Stamm.

16 *Agreement of Counsel.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE, LACKAWANNA & WESTERN Railroad Company. } No. 213, Com'th Docket, 1900.

And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,443, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to
17 and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21 being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent., either of the parties to be at liberty to file exceptions to, and appeal from, the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874.

JOHN P. ELKINS,
Attorney General.
M. E. OLMSTED,
A. C. STAMM.
Attorneys for Defendant.

Endorsement: 213, Com'th docket, 1900. Commonwealth *vs.* Delaware, Lack'a and Western Railroad Company. Agreement of counsel. Filed April 13, 1901. M. E. Olmsted, A. C. Stamm.

Affidavit of Fred. F. Chambers, Sec'y.

In Dauphin County Common Pleas.

COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE, LACKAWANNA & WESTERN Railroad Company. } No. 213, Com'th Docket, 1900.

STATE OF NEW YORK, *City of New York,* } *ss:*

On this 31st day of October, A. D. 1900, before me, a notary public in and for said State, residing in said city, personally appeared Fred. F. Chambers, who, being by me duly sworn according to law, did depose and say as follows, viz:

I am the secretary and treasurer of The Delaware, Lackawanna & Western Railroad Company, the above named defendant. The said company does now, and did in 1899, operate a system of railroads extending from Hoboken, New Jersey, opposite the city of
18 New York, to the city of Buffalo, in the State of New York, running through the State of Pennsylvania and with branches in each of the States of New Jersey, Pennsylvania and New York. The entire system of railroad operated comprises 770.71 miles of main line, of which 176.25 miles are in New Jersey, 200.37 miles in Pennsylvania, and 394.09 miles in New York.

The company owns, and did own during all of the year 1899, real estate in Pennsylvania of the actual value in cash of not less than $8,000,000 in addition to, and not constituting part of its railroad. All of this real estate is, from year to year, assessed and taxed for all purposes which real estate owned by individuals is taxed in the townships, boroughs and cities in which it is located. It was so assessed and taxed for the year 1899, and the county, city, borough, school, road, poor and other taxes paid by the company on said real estate for year amounted to $142,765. These taxes were in addition to taxes assessed against the company for State purposes, and in the assessment and collection of the said county, city, borough, school, road, poor and other local and municipal taxes no deduction or allowance whatever was made on account of any taxes paid or claimed, or to be paid or claimed, by the State for said year.

The company also for said year paid taxes on gross receipts, said taxes amounting to $7,393.97.

On account of tax on capital stock for the year 1899 the company has paid into the State treasury of Pennsylvania the sum of $100,000.

Briefly stated, the original formation of the company's system of railroads was as follows:

The Liggetts Gap Railroad Company was incorporated by a special act of the General Assembly of Pennsylvania, April 7, 1832. By special act of April 14, 1851, its name was changed to Lackawanna and Western Railroad Company. The Delaware and Cobbs Gap Railroad Company was incorporated by special act approved April 7, 1849. The two companies were consolidated under special act of March 11, 1853, into one corporation by the name of the Delaware, Lackawanna and Western Railroad Company,
19 being the present defendant. Into this corporation there was also merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal and Iron Company; and June 17, 1870, the Lackawanna and Bloomsburg Railroad Company.

By virtue of certain special and general acts of the legislature of New Jersey and New York, the defendant, from time to time acquired an interest in and control of certain railroads and properties in the said States of New York and New Jersey, so that it now operates an extensive system of railroads extending from the city of New York, through the States of New Jersey, Pennsylvannia and New York, to Buffalo, New York, with numerous branches in each of said three States.

The main line of railroad owned by the company in Pennsylvania extends from the Pennsylvania and New York State line, near Great Bend village, to the center of a railroad bridge across the Delaware river near Delaware station, originally constructed jointly by the Delaware, Lackawanna and Western Railroad Company and the Warren Railroad Company, the latter a corporation of New Jersey. The said main line in Pennsylvania is 114.33 miles in length. At the center of the bridge aforesaid it connects with what was formerly known as the Warren railroad, of which the defendant has now a perpetual lease, and which forms part of its main line; and at the Pennsylvania and New York State line, near Great Bend village, it connects with what was formerly known as the Valley railroad, of which the defendant has now a perpetual lease, and which forms part of its main, line; and at the city of Binghamton it connects with the New York Lackawanna and Western railway, of which the defendant has now a perpetual lease, and which forms part of its main line to Buffalo. In addition thereto the company owns branch railroads in Pennsylvania as follows:

Lackawanna & Bloomsburg branch, Scranton to Northumberland, 79.66 miles.

Keyser Valley branch, from junction with main line to Keyser Valley, 4.38 miles.

20 Winton branch, Nayaug to Winton, 7.61 miles.

Storr's branch from Winton Junction to Storr's mines, 2.72 miles.

The defendant also operates and substantially owns, or at least has therein such interest as was conveyed by the agreement, a copy of which is hereunto annexed, made part hereof and marked "Ex-

hibit A," a railroad known as the Warren railroad, extending from the center of the railroad bridge across the Delaware river, hereinbefore mentioned, to a point known as the "Junction," in the State of New Jersey, the said road being 18.8 miles in length, all in the State of New Jersey. The Warren Railroad Company, from which said railroad was acquired, never owned any equipment, but the said road has been at all times, and still is, operated with equipment furnished by the Delaware, Lackawanna and Western Railroad Company. It is operated as part of the main line of the Delaware, Lackawanna and Western Railroad Company. The ownership, interest or estate of the Delaware, Lackawanna and Western Railroad Company in the Warren railroad is, and was in the year 1899, of a fair cash value of not less than $1,000,000, in which estimate we do not include the equipment belonging to the Delaware, Lackawanna and Western Railroad Company and used upon the Warren railroad.

The defendant also owns and operates, or has such interest therein as was conveyed by agreement, a copy of which is hereunto annexed, made part hereof and marked "Exhibit B," the railroad known as the Morris and Essex railroad, extending from Hoboken to Phillipsburg, 119.71 miles, all in New Jersey. The ownership, interest or estate of the Delaware, Lackawanna and Western Railroad Company in the Morris and Essex railroad, as aforesaid, was, in the year 1899, of a fair cash value of not less than $1,000,000.

The Delaware, Lackawanna and Western Railroad Company also operates and owns, or has such interest therein as was conveyed by an agreement, a copy of which is hereunto annexed and marked "Exhibit C," the railroad known as the Valley railroad, ex-
21 tending from the New York and Pennsylvania State line to Binghamton, New York, a distance of 11.11 miles, all in the State of New York. Said ownership, interest or estate was in the year 1899, of a fair cash value of not less than $1,000,000. The said Valley railroad constituted a very important, valuable and profitable part of the company's main line of railroad.

The Delaware, Lackawanna and Western Railroad Company also owns and operates, or has therein such interest as was conveyed by an agreement, a copy of which is hereunto annexed, made part hereof and marked "Exhibit D," the railroad known as the New York, Lackawanna and Western railway, extending from Binghamton to Buffalo and Black Rock, a distance of 208.08 miles, all in New York. The said interest, ownership or estate was, in the year 1899, of a fair cash value of not less than $2,000,000. In this valuation we do not include 6.38 miles of railroad construction by a Pennsylvania corporation known as the New York, Lackawanna and Western Railway Company of Pennsylvania, crossing the Pennsylvania and New York State line three times into and through the townships of Waverly and Athens in the county of Bradford, Pa. The New York, Lackawanna and Western Railway Company of New York acquired that road from the Pennsylvania corporation by

agreement of October 23, 1883, and it is included in the lease to the Delaware, Lackawanna and Western Railroad Company.

The Delaware, Lackawanna and Western Railroad Company also owns and operates, or has such interest therein as was conveyed by an agreement, a copy of which is hereunto annexed, made part hereof and marked "Exhibit E," the railroad known as the Utica, Chenango and Susquehanna Valley Railway, extending from Greene to Utica, 75.66 miles, with branch to Richfield Springs, 21.75 miles, making a total of 97.41 miles, all in New York; the said ownership, interest or estate being, in 1899, of a fair cash value of not less than $1,000,000.

The Delaware, Lackawanna and Western Railroad Company also owns and operates, or has such interest, ownership or estate
22 therein as was conveyed by agreements hereunto annexed, made part hereof and marked Exhibits "F," "G," "H," "I," "J," "K," "L" and "M,", the following additional railroads, viz:

Morris & Essex extension, 1.92 miles, all in New Jersey.

Newark & Bloomfield railroad, 4.24 miles, all in New Jersey.

Passaic & Delaware railroad, 14.11 miles, all in New Jersey.

Chester railroad, 10.04 miles, all in New Jersey.

Passaic & Delaware Extension R. R., 7.41 miles, all in New Jersey.

Cayuga & Susquehanna railroad, 34.41 miles, all in New York.

Greene railroad, 8.10 miles, all in New York.

Oswego & Syracuse railroad, 34.98 miles, all in New York.

It is difficult to put separate valuations upon the ownership or interest by this company in the said eight railroads. They are operated together with other railroads above mentioned in Pennsylvania and in other States as parts of one general system, and while the last mentioned eight roads are not directly as valuable per mile as some of the others, nevertheless, as feeders of the general system and as enabling the company to find market for its anthracite coal production and thus furnishing traffic for the other lines, they are of considerable importance, and the ownership, interest or estates of the company therein estimated as having been in 1899 of the value of, say, $300,000.

The Delaware, Lackawanna and Western Railroad Company also, by reason of the ownership of a majority of the capital stock, controls the—

Syracuse, Binghamton and New York railroad, 80.95 miles, all in New York.

Sussex railroad, 29.52 miles, all in New Jersey.

Lackawanna and Montrose railroad, 10.48 miles, all in Pennsylvania.

Hanover and Newport railroad, 6.81 miles, all in Pennsylvania.

Hopatcong railroad, 0.89 miles, all in New Jersey.

23 wanna and Western Railway Company; the Oswego and Syracuse Railroad Company; the Passaic and Delaware Railroad Company; the Utica, Chenango and Susquehanna Valley Railway Company, and Greene Railroad Company.

In addition to the railroads leased to defendant in perpetuity and operated by it as part of its own system and constituting part of its main line, as already shown, the defendant owns a controlling interest in, and through its own officers operates the Syracuse, Binghamton and New York railroad, extending from Geddes, N. Y., to Binghamton, N. Y., about 81 miles. The total capital stock of the Syracuse, Binghamton and New York Railroad Company is $2,500,000, of which amount the defendant held and owned in 1899, $1,901,900. This road connecting with the Delaware, Lackawanna and Western railroad at Binghamton, constitutes an important feeder and throws a great deal of freight and passenger traffic upon defendant's railroad, and is, moreover, exceedingly profitable in itself, paying annually eight per cent. in divi-

[Matter between rules improperly placed in copy.]

The railroad owned by the defendant in Pennsylvania was constructed primarily for the purpose of transporting to various markets, chiefly of said State, the product of anthracite coal lands in Pennsylvania. The company is authorized by its charter to own coal lands and to mine and sell, and also to purchase and sell, coal. It is largely engaged in mining and selling coal. At least three-fourths of all the coal transported over its road consists of its own anthracite coal, and the extent to which it thus transports anthracite coal over its roads in Pennsylvania and elsewhere depends very largely on the extent to which it can find market for said coal at points beyond the limits of Pennsylvania.

The acquisition by it of the leases aforesaid of railroads in New Jersey and New York has enabled it very largely to extend its markets for anthracite coal, thus enabling it not only to employ and pay a very large additional force of men in mining said coal *and* also to largely increase the traffic of the railroads wholly owned by it in Pennsylvania. The leases aforesaid are valuable to defendant not only by reason of the operation of the leased roads themselves, but

24 because their control by the defendant makes the roads owned by it in Pennsylvania much more valuable and profitable because of the large increase of tonnage thus thrown upon them. The most of the leases above recited were secured in December, 1868, and in 1869, and in the spring of 1870. The New York, Lackawanna and Western was not secured until October 2, 1888. The importance of the earlier leases is shown by the fact that whereas in 1868 the total amount of anthracite coal shipped over the defendant's road in Pennsylvania was 1,772,414 tons, in 1870 there were shipped 2,870,450 tons, all of which passed over the roads of

the company in Pennsylvania, as well as over the leased lines in other States.

After the acquisition of the New York, Lackawanna and Western road, by perpetual lease in 1882, thus extending defendant's main line through to Buffalo, which point, next to the city of New York, is the most important market for anthracite coal, the defendant's tonnage further increased so that during the year ending June 30, 1897, it transported 6,905,109 tons of anthracite coal, and during the year ending June 30, 1899, 7,043,624 tons. The acquisition of the New York, Lackawanna and Western road by lease also threw upon the company's roads in Pennsylvania a very considerable additional traffic in grain and other agricultural products. In 1881, the year before the lease was acquired, the total amount of agricultural products transported by defendant was 289,984 tons, whereas during the year ending June 30, 1897, the amount transported was 1,029,347 tons, and during the year ending June 30, 1899, 1,279,275 tons, over one-half thereof being grain coming upon defendant's railroad in Pennsylvania, from its leased road, the New York, Lackawanna and Western railway, and when leaving Pennsylvania, carried over its leased line in New Jersey to tide-water at New York.

Defendant's transportation of merchandise from manufacturers has also been more than doubled since the acquisition of the New York, Lackawanna and Western lease.

Defendant's transportation of passengers upon its roads in
25 Pennsylvania has been greatly increased by its acquisition of the leased roads aforesaid. Thus, in 1897, there were transported upon its roads in Pennsylvania passengers of all classes, 187,533; through passengers on the main line amounting only to 4,417. The acquisition of the leases in 1868, 1869 and 1870 increased the passenger traffic, which was then very small, about twenty-five per cent. In 1881, the last year before the acquisition of the New York, Lackawanna and Western lease, the total number of passengers transported was 742,624, of which 20,171 were through passengers. The total passenger mileage—that is to say the total number of passengers carried one mile in Pennsylvania—was 10,965,077. In 1883, the first year after the acquisition of the said lease, the total number of through passengers was 315,964, and the total number of passengers carried one mile in Pennsylvania was 27,533,100. The total number of passengers carried in that year was 939,404. After the New York, Lackawanna and Western railroad had been fully completed and equipped, the defendant was enabled to run through fast passengers trains from New York to Buffalo, passing over its leased lines in New Jersey and New York and its owned lines in Pennsylvania, thereby increasing its passenger traffic so that during the year 1899 the total number of passengers carried was 12,969,893; the total number of passengers carried one mile in Pennsylvania was 42,641,382, and upon the entire system over 260,274,000, a result which, of course, would never have been accomplished except for

the passenger traffic furnished the company's road in Pennsylvania from the leased lines in New York and New Jersey.

The defendant's coal property in Pennsylvania is also, of course, made much more valuable by reason of the company's control, by perpetual lease, of the railroads in New York and New Jersey forming part of its through line. If defendant did not own the leasehold interests, which it has acquired as aforesaid in railroads in New York and New Jersey, it would have to transport its coal to market over railroads owned or controlled largely by its rivals in the anthracite coal business, and would be at great disadvantage, both as to rates of transportation and terminal facilities, as well
26 as in the number and importance of the points for the marketing of its coal.

Under all the circumstances, the aggregate valuation of $6,300,000 hereinbefore placed upon its leases, is believed to be very conservative and low. The defendant would not surrender the said leases for that amount, and if by any means it should be deprived of them, the property owned by it in Pennsylvania would not be nearly so valuable and its capital stock would depreciate in value more than $6,300,000. The actual value in cash of the company's capital stock was that much greater than it would have been had the company not owned the said leasehold interests in railroads in New York and New Jersey.

The construction of the leased roads was promoted by the Delaware, Lackawanna and Western Railroad Company, which loaned its own funds and its own credit to bring about their construction, and it still held on November 1, 1899, capital stock in them as follows, viz:

Morris & Essex Extension R. R. Co.	$42,300 00
Newark & Bloomfield R. R. Co.	97,450 00
Passaic & Delaware R. R. Co.	109,350 00
Valley R. R. Co.	5,000 00
New York, Lackawanna & Western Ry Co.	70,400 00
Greene R. R. Co.	400 00
Utica, Chenango & Susq. Valley Ry Co.	20,000 00
Warren R. R. Co.	10,000 00

The average actual value of all of these stocks is not less than their par value.

The defendant also owned $2,000,000 of the bonds of the New York, Lackawanna and Western Railway Company, and $100,000 of the bonds of the Chester Railroad Company. It has also assumed all the liabilities and guaranteed the principal and interest of all the bonds of the Morris and Essex Railroad Company, amounting to $24,269,000; of the New York, Lackawanna and Western Railway Company, amounting to $22,000,000; and most, if not all, of the bonded debt of the other leased companies.

27 Either W. H. Truesdale, the president of the Delaware, Lackawanna and Western Railroad Company, or some other

officer of the defendant company, is the president of the Morris and Essex Railroad Company; the New York, Lacka-

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dends. From that source the defendant received in 1899 $152,152 of dividends, which went into its own treasury, swelling its own income, and going, of course, into the funds from which it paid dividends to its own stockholders, which dividends increased the market value of defendant's own capital stock. Defendant's secretary and treasurer hold similar offices in the Syracuse, Binghamton and New York Railroad Company, and the general office of the said company is in the general office of the defendant company at No. 26 Exchange place, in the city of New York. Defendant's interest or ownership in said railroad is of the value of not less than $2,860,000.

[Matter between rules improperly placed in copy.]

In a few instances the equipment of the roads operated by defendant in New York and New Jersey, as above set forth, was acquired with the roads, but the most of them have no equipment whatever, except as furnished by defendant. The total equipment owned by the Delaware, Lackawanna and Western Railroad Company in 1899, not including any which had been acquired with roads leased to, and operated by it, was inventoried at, and was of the actual value of $7,891,217. This equipment was and is used upon the entire system in New Jersey and New York, as well as in Pennsylvania, interchangeably with the equipment of such leased or controlled roads mentioned as possessed some equipment of their own. That is to say, the leased equipment of roads in other States was used in Pennsylvania, and that owned by the defendant was used in other States, as well as in Pennsylvania. Determined by the proportion which the number of miles operated and equipped by the company in Pennsylvania bears to the whole number of miles operated and equipped by it, the value of the equipment owned and used in Pennsylvania was $1,986,219.

In the year 1899 the Delaware, Lackawanna and Western Railroad Company owned shares of stock in corporations of the
28 State of Pennsylvania, subject to and paying a tax upon capital stock, imposed by the twenty-first section of the revenue act of 1889, as amended by the acts of 1891 and 1893, as follows, viz:

Name of company.	No. of shares.	Par value of shares.	Total par value.
Lackawanna Iron & Steel Co.	258	$100	$25,800
Lackawanna Iron & Coal Co.	43	100	4,300
Providence Gas & Water Co.	1,694	100	169,400
Bangor Union Slate Co.	175	100	17,500
Lackawanna & Montrose R. R. Co.	1,592	50	79,600

The defendant company also owned real estate outside of Pennsylvania in 1899 of the value of $1,195,907, said real estate consisting of lots of ground and buildings and structures thereon located in the States of New York, New Jersey and Illinois.

Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was
29 approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold the proceeds are returned to the company's treasury in the city and State of New York.

In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after, its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.

Although the Delaware, Lackawanna and Western Railroad Company was originally chartered under the laws of Pennsylvania, it has received authority to transact business and hold land in New Jersey and also transact business and hold land — have its general office and place of business in the city and State of New York, said authority having been granted by special acts of the legislature of said States. It is also authorized, by virtue of a special act of the General Assembly of Pennsylvania, to maintain its general office and place of business and hold its stockholders' meetings in the city of

New York, and to have as president, directors and other officers, non-residents of the State of Pennsylvania. In pursuance of authority conferred by legislative enactments of the said two States, the company's general office and place of business, including its treasury, is, and was in 1899 and for many years prior thereto, located at No. 26 Exchange place, in the city of New York. Its president, secretary and treasurer and other general officers are non-residents of Pennsylvania and reside in the city of New York or its vicinity, and have their offices in the company's general office at No. 26 Exchange place, as aforesaid.

30 During the year 1899 the company held in its treasury at 26 Exchange place in the city of New York and State of New York, bonds of other corporations as follows:

Name of corporation.	Par value of bonds.	Actual value of bonds as nearly as can be ascertained or estimated.
Chester railroad	100,000	$100,000
Kewaukee Green Bay & West. R. R	1,000	1,000
New York, Lack. & Western Ry	2,000,000	2,500,000
Lack. Iron & Steel Co	12,000	12,000
Syracuse & Baldwinville Ry	84,000	No actual value

Also certificates of stock in other corporations as follows:

Name of corporation.	Par value of stock.	Actual value of stock as nearly as can be ascertained or estimated.
Morris & Essex Extension R. R	42,300	$43,300
Newark & Bloomfield R. R	97,450	116,940
Passaic & Delaware R. R	109,350	109,350
Warren R. R	10,000	18,000
Valley R. R	5,000	6,000
New York, Lack. & West. Ry	70,400	91,520
Greene railroad	400	400
Utica, Che. & Susq. Valley Ry	20,000	31,000
Syr., Bing. & New York R. R	1,901,900	3,233,230
Green Bay & Western R. R	3,540	No actual value
Lack. Iron & Coal Co	4,300	4,300
Lack. Iron & Steel Co	25,800	25,800
Prov. Gas. & Water Co	169,400	169,400
Lack. & Montrose R. R	79,600	59,700
Hopatcong R. R	10,000	10,000
Sussex R. R	15,650	7,825
Bang. Union Slate Co	17,500	No actual value

31 Also notes and bills receivable of the aggregate value of $93,160.

Also accounts receivable of the aggregate value of $2,489,655.

All of the aforesaid stocks, bonds, notes, bills receivable and accounts receivable were physically located, held and owned in the general treasury of the company at 26 Exchange place, in the city of New York, during the year 1899, and were not at any time within the Commonwealth of Pennsylvania. They were also taxed directly or indirectly in the city and State of New York.

The company also owned in 1899, 2 tugs, 59 coal barges and 14 schooner barges, registered and used wholly outside the State of Pennsylvania, of the aggregate value of $498,700.

The business of the company is of an interstate character, at least eighty per cent. of all the freight transported over its railroad being carried from Pennsylvania into other States, or from other States into Pennsylvania, or from points in other States, passing through Pennsylvania, to points in other States, or from points in other States to points in other States, without touching Pennsylvania at all.

Since 1892 there have been actually paid into the State treasury of Pennsylvania by this company $967,500.

The company has paid into the State treasury on account of tax on capital stock for the year 1899 the sum of $100,000.

All of which is correct and true according to the best of my knowledge, information and belief.

(S'g'd) FRED. F. CHAMBERS.

Sworn and subscribed before me the day and year aforesaid.

LUDWIG R. MILLER,
Notary Public Appointed from Kings Co.

Certificate filed in New York.

[SEAL.]

32 *Affidavit of W. H. Truesdale, President.*

STATE OF NEW YORK, } ss:
City of New York, }

On this 31st day of October, A. D. 1900, before me, a notary public in and for said State, residing in said city, personally appeared W. H. Truesdale, who, being by me duly sworn according to law, did depose and say as follows, viz:

I am the president of The Delaware, Lackawanna and Western Railroad Company, the above-named defendant. I am familiar with its property, business and affairs. I have carefully read the foregoing sworn statement of Mr. Fred. F. Chambers, the secretary of the company, and fully concur therein and desire that the same may be con-

sidered with like effect as if the contents thereof were herein recited and set forth at length.

(S'g'd) W. H. TRUESDALE.

Sworn and subscribed before me the day and year aforesaid.

LUDWIG R. MILLER,
Notary Public Appointed from Kings County.

Certificate filed in New York county.
[SEAL.]

Endorsement: No. 213, Com'th docket, 1900.—Com. vs. Delaware, Lackawanna & Western Railroad Co.—C. S. '99.—Affidavits of Fred F. Chambers, sec'y and W. H. Truesdale, pres't. Filed April 13, 1901.—M. E. Olmsted, A. C. Stamm.

33 *Verdict.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA vs. DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 213. Com'th Docket, 1900.

Verdict.

Tax	$111,250.00
Less 5 mills on coal, $1,702,443.00	8,512.21
	102,737.79
Less payment on account	100,000.00
	2,737.79
Add att'y general's commission of 5 per cent	136.88
Verdict for	$2,874.67

H. C. HOUTZ, *Foreman.*

4/13/01.

Satisfaction.

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA vs. DELAWARE, LACKAWANNA & WESTERN RD. CO. } No. 213, Commonwealth Docket, 1900.

Received April 29, 1901, of above defendant the sum of two thousand eight hundred eighty-six dollars and sixty-seven cents *dollars*

($2886.67) in full of debt, interest, attorney general's commission and docket costs on above stated judgment, and the prothonotary is hereby directed to mark the same satisfied.

FREDERIC W. FLEITZ,
Deputy Attorney General.

34 *Additional Affidavit of Fred. F. Chambers.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA
vs.
DEL., LACKA. & WESTERN R. R. Co. } No. 213, Com'th Docket, 1900.

STATE OF NEW YORK,
City of New York, } *ss:*

On this 25th day of May, A. D. 1901, before me, a notary public in and for said State and residing in said county, personally appeared Fred. F. Chambers, being by me duly sworn according to law, who did depose and say as follows:

I am the secretary and treasurer of the Delaware, Lackawanna and Western Railroad Company. Referring to taxes mentioned in my former affidavit in the above entitled case, I desire to add that they have been paid, I believe. The company is not contesting, but on the other hand concedes the rights of New York, New Jersey, Michigan and Illinois, and the other States, and Canada, to tax coal located and stored in said States. The only question pending at present is as to the amount of valuation in the State of New York for 1899, and as soon as that valuation is definitely fixed the company will pay the tax without any question as to the authority of the State to levy the same. All taxes, so far as I can now recall, State and local, which have been assessed against this company for 1899, in any of the States mentioned, have been paid.

All of which is correct and true to the best of my knowledge, information and belief.

(S'g'd) FRED. F. CHAMBERS.

Sworn and subscribed before me the day and year aforesaid.

LUDWIG R. MILLER,
Notary Public Appointed from Kings County.

Certificate filed in New York county.
[SEAL.]

Endorsement: No. 213, Com'th docket, 1900.—Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co.—Affidavit of Fred. F. Chambers, secretary & treasurer.—Filed May 28, 1901.—M. E. Olmsted, A. C. Stamm.

35 *Judgment of the Court on Reserved Question.*

The judgment upon the verdict of the jury has been paid in full. A question as to tax on capital stock representing coal stored at points in other States, was, by agreement of the parties, withdrawn from the jury, and submittted to the court as if under the act of April 22, 1874, to find both the facts and the law, and judgment was entered by the court upon the reserved question as follows, viz:

Tax on coal	8,512 21
Interest at 12% from July 8, 1900, to May 22, 1901	945 89
Attorney general's commission	425 61
Total	$9,883 71

Findings of Fact and Opinion of the Court of Common Pleas.

By the COURT: This case arose upon an appeal by defendant from an account for tax on capital stock for the tax year 1899, said account amounting to $242,350. Certain questions raised by the appeal having, by agreement of counsel, been withdrawn from the jury and submitted for the determination of the court without a jury, as if under the act of April 22, 1874, we find the following facts:

1. The Delaware, Lackawanna and Western Railroad Company was organized under the special act of the General Assembly of Pennsylvania approved March 11, 1853, by the consolidation of the Liggetts Gap Railroad Company, incorporated under the act of April 7, 1832, whose name was, by the act of April 14, 1851, changed to Lackawanna and Western Railroad Company, and the Delaware and Cobbs Gap Railroad Company, incorporated by the act of April 7, 1849. Into the Delaware, Lackawanna and
36 Western Railroad Company as formed by the merger of the Lackawanna and Western Railroad Company and the Delaware and Cobbs Gap Railroad Company, were merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal and Coke Company, and June 17, 1870, the Lackawanna and Bloomsburg Railroad Company. The company, as authorized by special act of Pennsylvania legislature, has its general office and treasury in the city and State of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy and sell coal and convey the same to market; and, in addition, to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying and selling coal. The

proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of $48,470,000, and in making up the claim of the State for taxes for said year, the auditor general made no deductions whatever, but charged tax at five mills upon said aggregate valuation of $48,470,000, the said tax amounting to $242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania in New York, Illinois and other States of the value of $1,702,443, and, as already stated, no deduction was made by the auditor general in his statement of account against the company for or with respect to this coal. All taxes assessed against the company for 1899 in other States, on coal located there have been paid, according to the belief and so far as the secretary of the company can now, May 25, 1901, recall.

2. There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the attorney general, on behalf of the Commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz:

"And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon
$1,702,444, being the value of coal held and owned at points
37 in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21 being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent., either of the parties to be at liberty to file exceptions to, and appeal from, the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874."

3. The case having been submitted to the jury, a verdict was rendered as follows, viz:

'Tax	$111,250 00
Less five mills on coal $1,702,443.00	8,512 21
	$102,737 79
Less payment on account	100,000 00
	$2,737 79
Add attorney general's commission of 5 per cent	136 88
Verdict for	$2,874 67"

The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the court as aforesaid of the defendant's liability to taxation with
38 respect to capital stock invested in coal located outside of Pennsylvania.

4. The facts agreed upon by counsel for the Commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz:

"Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instances, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois, and other

States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the city and State of New York.

"In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after,
39 its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale."

5. The corporation defendant is authorized by law to transact business and to hold lands in other States for depot, wharfage and coal yard accommodations and to make such agreements and contracts with corporations and individuals of other States as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business and to hold its stockholders' meeting, in the State of New York, and to have as president, directors and other officers, non-residents of the State of Pennsylvania. The company is taxable upon the *value* of the property represented by its capital stock, and not upon the *amount* of the latter.

Being a tax on property it follows that the State cannot tax that part or portion of its property, which is permanently located beyond her territorial limits, of which is "intended permanently to serve any corporate purpose of its owner."

The coal was here as real estate, until it was mined. It became, and remained, personal property from that time. As such it entered into the value of capital stock. It was transported to points in other States for temporary storage and immediate sale. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this State, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the State for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other States and places after it was sold. But wherever sold, the proceeds eventually came back to the State from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

40 The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

It is this itinerant trait which likens the case to the dredges, tugs and scows in Commonwealth *vs.* American Dredging Company, 122 Pa., 386, employed beyond, but taxed within, the boundaries of this

State; and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for State purposes for the year specified.

That cannot be said to be permanent or have fixity, which is voyaged from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuit or business of the owner. They may with propriety be said to be located there permanently.

But coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this State, and must accordingly respond to the burden of taxation in this State. Protection and taxation are co-related.

It is testified to and not contradicted, that the coal for the tax year 1899 was intended to and did become part of the general mass of property in the other States, "and the property is there annually taxed upon, or in respect of, the same, and was so taxed in 1899."

All taxes assessed against the company for 1899 in other States on coal located there have been paid, according to what the secretary of the company says he believes and so far as he can now recall, but it does not appear that said taxes were not for local or municipal purposes and not for State purposes, and it does appear that the taxes laid were paid without contest.

The company may thrive better by resisting the collection of a tax on coal in those States into which it has been shipped,
41 than here, where the property in question is accorded protection, and where it enters into the value of the capital stock and is primarily taxable.

Taxation there would not suspend the right to tax property located here and forming part of a mass which, as well before severance from the land as after, and of course, prior to its transportation elsewhere, entered into and affected the value of the capital stock, and which was so deposited elsewhere, for a mere temporary and not a permanent, purpose. Primary jurisdiction to tax the coal attached here and its voluntary carriage into other States for sale, does not detach it, even if by law of those States it is again taxable there.

What the Supreme Court in Brown *vs.* Houston, 114 U. S. 622, decided, as we understand it, is, that a tax laid by the State of Louisiana, pursuant to a general law, upon coal transported into that State from Pennsylvania, where a tax was theretofore laid upon capital stock representing the same property and paid for the same year was not violative of the provisions of the Constitution of the United States relative to duties on imports or exports and regulating commerce among the several States.

Mr. Justice Bradley, p. 623, says: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination, and was

up for sale." It was "an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject."

There was no assessment of a tax upon the real estate lying beyond the limits of the State, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the Commonwealth, and never subject to the visatorial power of the auditor general or any other authority.

42 But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition.

The company is required not only to estimate and appraise its capital stock at its actual value in cash between the first and fifteenth days of November of each year, but it must be not less "than the average price the said stock sold for during the year ending with the first Monday of November," 1899, "and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus of sinking fund."

After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing, to-morrow—fugitive ever until it reaches the torch.

By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other States ought to be exempt from further taxation there for the State purposes.

This rule is also in accord with the dictates of equity, for by it the value of the product as represented by the capital stock, can be ascertained with almost mathematical exactness.

In Commonwealth *vs.* Railroad Co., 145 Pa., 104, the Supreme Court, commenting upon the case of Commonwealth *vs.* American Dredging Company, 122 Pa., 286, says: "The dredges which were the subjects of the controversy were taxable at the situs of the company, for the reason that, although wholly used outside of the Commonwealth, they did not remain in any one place long enough to render them liable to taxation there."

43 Having reached the conclusion that the shipment of the coal into other States for the purpose of sale does not give it the character of permanence there, so as to exempt it from taxation here, and being also of the opinion that even if the testimony had actually disclosed the fact that the coal shipped into the other States was taxed for the same year prior to its disposition and the tax paid

by the company, it would still be taxable by this State, there remains only the duty to direct judgment to be entered upon the reserved question in favor of the Commonwealth and against the defendant company for the sum of $8,512.21 eight thousand five hundred and twelve and twenty-one one-hundredths dollars, with interest from July 8, 1900, unless exceptions are filed as required by law, as follows, viz:

Tax on coal	$8,512 21
Interest at 12% from July 8, 1900, to May 22, 1901	945 89
Attorney general's commission	425 61
	$9,883 71

(S'g'd) JOHN H. WEISS, *J.*

May 28, 1901.

Endorsement: No. 213, Com'th docket, 1900.—Com'th of Penna. *vs.* Delaware, Lackawanna and Western Railroad.—Tax on capital stock for 1899.—Opinion.—Filed May 28, 1901.

Defendant's Points.

Defendant respectfully submits the following points:

1. The tax on capital stock, imposed by the statutes upon which the Commonwealth's claim is based, is a tax upon the property and assets of the corporation.

2. If, for any reason, a portion of the property and assets of the corporation are not subject to taxation in Pennsylvania, a proportionate deduction must be made from the valuation upon which the tax on capital stock is imposed.

3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.

44 4. The taxation of coal, or of capital stock representign coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

(") M. E. OLMSTED,
(S'g'd) A. C. STAMM,
Attorneys for Defendant.

Answers to Defendant's Points.

1. Affirmed.

2. Affirmed if the whole capital stock has been valued in the report and appraisement made to, and by the auditor general.

3. Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.

4. Refused for reasons given in the general opinion.

By the court,

(Signed) JOHN H. WEISS, *J.*

May 28, 1901.

Endorsement: No. 213, Com'th docket, 1900—Com'th of Penna. vs. Delaware, Lacka. & Western R. R. Co.—Defendant's points and answers of the court thereto.—Filed May 28, 1901.—M. E. Olmsted, A. C. Stamm.

Defendant's Exceptions.

This case having been heard by the court without the intervention of a jury as if under the act of April 22, 1874 (P. L. 109), as provided in said act, defendant files the following exceptions to the decision of the court, viz:

1. The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz:

"1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock
45 of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them can be so construed, they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

2. The learned court erred in not sustaining the second objection specified in defendant's appeal, said objection being as follows, viz:

"2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interest in railroads and railway equipment, real

estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

3. The learned court erred in not sustaining the third objection specified in defendant's appeal, said objection being as follows, viz:

"3. The account hereby appealed from charges tax upon property, or upon capital stock representing property, 'not within the territorial limits of the authority levying the tax,' and is for that reason, as well as others, in violation of section 1 of article IX. of the constitution of Pennsylvania."

46 4. The learned court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

"4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective proportions of capital stock invested in and out of the State, and is for that reason, in violation of section 1 of article IX. of the constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States."

5. The learned court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

"11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or any or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits."

6. The learned court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

"12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Penn-

sylvania in the account hereby appealed from, is in violation
47 of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits."

7. The learned court erred in its answer to the third point submitted by defendant, said point and the answer thereto being as follows, viz:

"3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania."

Answer: "Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused."

8. The learned court erred in its answer to the fourth point submitted by defendant, said point and the answer thereto being as follows, viz:

"4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

Answer: "Refused for reasons given in the general opinion."

9. The learned court erred in directing judgment to be entered in favor of the Commonwealth and against the defendant for $9,883.71.

10. The learned court erred in not directing judgment to be entered in favor of the defendant and against the Commonwealth.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

By its attorneys,
(S'g'd) M. E. OLMSTED,
(") A. C. STAMM.

Order of Court Overruling Defendant's Exceptions.

And now, May 29, 1901, the within exceptions are overruled and judgment is directed to be entered in accordance with the opinion heretofore filed. To this ruling defendant excepts and at its request exception sealed.

By the court:
(S'g'd) JOHN H. WEISS, *J.*

Endorsement: No. 213, Com'th dkt., 1900. Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co. Filed May 29, 1901. Defendant's exceptions. M. E. Olmsted, A. C. Stamm.

48 *Supreme Court of Pennsylvania Docket Entries.*

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of the said court, at the city of Harrisburg, Pennsylvania, on the 21" Monday following the 1" Monday of Janurary, A. D. 1901.

Present: Honorable Henry Green, chief justice; J. B. M'Collum, James T. Mitchell, John Dean, D. Newlin Fell, J. Hay Brown, and S. L. Mestrezat, justices, and William Pearson, prothonotary of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district, to May term 1901, No. 18, it is contained as follows, to-wit:

Docket Entries.

COMMONWEALTH OF PA. vs. DELAWARE, LACKAWANNA & WESTERN R. R. Co. (Appellant).	No. 213, Com. Docket of 1900.

Certiorari sur appeal to common pleas of Dauphin county.

May 29" 1901.—App. and aff. filed.
Eo die, exit writ, r't'ble *sec. reg.*
June 1" 1901.—Record filed.
June 3" 1901.—Assignments of error filed.
June 4" 1901.—Continued.
June 2" 1902.—Argued.
Oct. 13" 1902.—Argument ordered, *per curiam.*
Argued June 1" 1903.
49 July 9" 1903.—Judgment affirmed per Brown, J.
July 15" 1903.—Record remitted.

March 2" 1904.—Petition for writ of error to Supreme Court of the United States.

Writ of error from said court, allowed by Hon. E. D. White, associate justice of said court and citation from said Hon. E. D. White, accepted by Hon. Hampton L. Carson, attorney general of Pennsylvania, filed.

March 2" 1904.—Writ of error bond in sum of $19,767,42 filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

50 *Affidavit and Appeal.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PA., Plaintiff, vs. DELAWARE, LACKAWANNA & WESTERN R. R. Co., Defendant and Appellant. } No. 213, Com. Docket of 1900. Court of C. P. of the County of Dauphin.

Enter appeal on behalf of defendant from the judgment of the court of common pleas of the county of Dauphin

To William Pearson, proth'y sup. ct. middle district.

M. E. OLMSTED.

STATE OF PENNSYLVANIA, *County of Dauphin,* } *ss:*

M. E. Olmsted attorney for appellant being duly sworn saith that the above appeal is not intended for delay, but because he firmly believes that his client suffered injustice by the judgment from which he desires to appeal.

[Seal of Supreme Court of Pa., Middle District.]

M. E. OLMSTED,
Attorney for Delaware, Lackawanna & Western R. R. Co.

Sworn and subscribed before me this 29 day of May A. D. 1901.

WILLIAM PEARSON,
Prothonotary.

51 *Writ of Certiorari from Supreme Court of Pa.*

MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

[Seal of Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

We being willing, for certain causes, to be certified of the appeal of the Delaware, Lackawanna & Western R. R. from the judgment of said court in suit of Commonwealth of Pa. said appellant to No. 213 Com. docket of 1900—before you or some of you depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court, at a supreme court to be holden at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday following

1st Mon. of Jan. 1901, being the 1st Monday of the term, so full and entire as in our court before you they remain, you certify and send together with this writ; that we may further cause to be done thereupon, what of right and according to our laws of the said State ought.

Witness, the Honorable J. B. M'Collum, doctor of laws, chief justice of our supreme court, at Harrisburg, the 29th day of May, in the year of our Lord, one thousand nine hundred and one, and of the Commonwealth the 125th.

WILLIAM PEARSON,
Prothonotary.

52 Endorsement.

The record and process, with all things touching the same, so full and entire as before us, they remain to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JOHN H. WEISS. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]

[Endorsed:] 213 Com'th dk. 1900 No. 18 May term, 1901 Supreme court, middle district. Commonwealth of Pa. *vs.* Delaware, Lackawanna & Western R. R. Co. appellant Certiorari to the court of common pleas for the county of Dauphin Returnable the 21 Mon. foll. 1 Monday of Jan. 1901 "Rule on the appellee to appear and plead on the return day of the writ." N. B.—10 days' notice to the parties or their counsel below necessary to compel an appearance. Filed May 29 1901

53 *Specifications of Error.*

I. The learned court erred in overruling defendant's first exception, which exception was as follows, viz.:

"1. The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz.:

"'1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if

the said acts or either or any of them do they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

II. The learned court erred in overruling defendant's second exception, which exception was as follows, viz.:

"2. The learned court erred in not sustaining the second objection specified in defendant's appeal, said objection being as follows, viz.:

"'2. Appellant's system of railroads is partly in Pennsylvania and party in other States. In the roads in other States be-
54 longing to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interests in railroads and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

III. The learned court erred in overruling defendant's third exception, which exception was as follows, viz:

"3. The learned court erred in not sustaining the third objection specified in defendant's appeal, said objection being as follows, viz:

"'3. The account hereby appealed from charges tax upon property, or upon capital stock representing property, "not within the territorial limits of the authority levying the tax," and is for that reason, as well as others, in violation of section 1 of article IX. of the constitution of Pennsylvania.'"

IV. The learned court erred in overruling defendant's fourth exception, which exception was as follows, viz:

"4. The learned court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

"'4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective proportons of capital stock invested in and out of the State, and is, for that reason, in violation of section 1 of article IX. of the constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States.'"

55 V. The learned court erred in overruling defendant's fifth exception, which exception was as follows, viz:

"5. The learned court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

"'11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits.'"

VI. The learned court erred in overruling defendant's sixth exception, which exception was as follows, viz:

"6. The learned court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

"'12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits.'"

VI*a*. The learned court erred in not holding that the taxation by the State of Pennsylvania of coal mined within the State and shipped into other States and there stored for the purposes of sale is in violation of article I., section 8, clause 3, of the Constitution of the United States, which provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

VII. The learned court erred in overruling defendant's seventh exception, which exception was as follows, viz:

"7. The learned court erred in its answer to the third point submitted by defendant, said point and the answer thereto being as follows, viz:

56 "'3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.'"

"Answer: 'Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.'"

VIII. The learned court erred in overruling defendant's eighth exception, which exception was as follows, viz.:

"8. The learned court erred in its answer to the fourth point submitted by defendant, said point and the answer thereto being as follows, viz.:

"'4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

"Answer: 'Refused for reasons given in the general opinion.'"

IX. The learned court erred in overruling defendant's ninth exception, which exception was as follows, viz.:

"9. The learned court erred in directing judgment to be entered in favor of the Commonwealth and against the defendant for $9,883.71."

X. The learned court erred in overruling defendant's tenth exception, which exception was as follows, viz.:

"10. The learned court erred in not directing judgment to be entered in favor of the defendant and against the Commonwealth."

XI. The learned court erred in directing judgment to be entered in favor of the Commonwealth and against the defendant for $9,883.71.

XII. The learned court erred in not directing judgment to be entered in favor of defendant.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

(S'g'd) By its attorneys, M. E. OLMSTED,
(") A. C. STAMM.

Endorsement: Com. of Pa. *vs.* D., L. & W. R. R. Co. In supreme court of Pa. middle district. Specifications of error. Filed in supreme court June 3, 1901.

57 *Order of Court Directing Re-argument.*

COMMONWEALTH OF PENNSYLVANIA
v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD Company and Pennsylvania Coal Company.
} Nos. 18, 19, and 20. May Term, 1901.

Appeals from C. P., Dauphin.

Per Curiam:

We permitted these three cases to be submitted on the paper books under the impression, at the time the application was made to so submit them, that the facts were identical with those in Com-

monwealth *v.* Pennsylvania Coal Company, 187, Pa., 551. An examination of the paper books having disclosed a difference in the facts, it is ordered that these appeals be placed upon the argument list for the middle district at May term, 1903.

Endorsements: 18, 19 and 20, May term, 1901. Commonwealth of Pennsylvania *v.* Delaware, Lackawanna & Western Railroad Company and Pennsylvania Coal Company. Appeals from C. P. Dauphin. Argument ordered: *Per curiam.* Filed Oct. 13, 1902. Supreme Court. M. D.

58 *Opinion of the Supreme Court of Pennsylvania.*

COMMONWEALTH OF PENNSYLVANIA *v.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 18. May Term, 1901.

Appeal from C. P., Dauphin.

BROWN, *J.:*

This case is not distinguishable from Commonwealth *v.* Penna. Coal Co., 197 Pa., 551, and is controlled by it. Our attention is called to the fact that, in the present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. A sufficient answer to this is the court's finding that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest.

One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the Commonwealth is entitled to her tax. When shipped out of the State it is for the purpose of sale, and not for permanent storage. As fast as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury. "It is not a thing," as the learned judge below very properly said, "used
59 in the prosecution of the business of the company." The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business,

This is the limit of exemption from taxation here, and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers.

Judgment affirmed.

Argued June 1, 1903.

M. E. Olmsted for appellant.

Hon. Hampton L. Carson for appellee.

Present: All justices except McCollum.

Opinion filed July 9, 1903.

[Endorsed:] No. 18. May term 1901. Com. of Pa., *v.* Del. Lack. & West'n R. R. Co.

60 COMMONWEALTH OF PENNSYLVANIA, *County of Dauphin,* } *sct:*

I, William Pearson, prothonotary of the supreme court of Pennsylvania, in and for the middle district thereof, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna & Western R. R. Co. at No. 18 of May term, 1901 as full, entire and complete as the same remains on file in the said supreme court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the prothonotary of said court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Harrisburg, in the county of Dauphin, in the said middle district of Pennsylvania, this 13th day of July in the year of our Lord one thousand nine hundred and three.

[Seal of Supreme Court of Pennsylvania, Middle District.]

WILLIAM PEARSON,
Prothonotary.

60½ [Endorsed:] No. 18 May term, 1901. Commonwealth of Penna. *vs.* Delaware, Lackawanna & Western R. R. Co. appellant Certificate of opinion

61 *Remittitur.*

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the judges of the court of common pleas for the county of Dauphin, Greeting:

Whereas, by virtue of our writ of certiorari from our supreme court of Pennsylvania in and for the middle district, returnable in the said

court on the 21st Monday following 1st Monday of January in the year of our Lord one thousand nine hundred and one, a record was brought into the same court of a judgment rendered against The Delaware, Lackawanna & Western Railroad Company appellant, at the suit of The Commonwealth of Pennsylvania appellee, and it was so proceeded in our supreme court that the said judgment was affirmed and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of assembly in such cases made and provided,) ordered by the said supreme court to be remitted to the court of common pleas for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness, the Hon. J. B. M'Collum chief justice of our supreme court at Harrisburg, the 10th day of July in the year of our Lord one thousand nine hundred and three

WILLIAM PEARSON,
Prothonotary.

61½ [Endorsed:] 213 Com'th dk. 1900 No. 18 May term, 1901 Supreme court of Pennsylvania. Commonwealth of Penna. *vs.* —— —— Remittitur to —— county.

Costs.

(Paid by —— ——)

Prothonotary, (—— ——)	$12 00
Attorney, (—— ——)	3 00
Amount	$15 00

62 *Return to Writ of Error from Supreme Court of the United States.*

And now here on this day, to-wit March 2", 1904, the said, The Delaware, Lackawanna & Western Rail Road Co. produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington within thirty days from the date of the said writ, viz: February 17". 1904 which writ of error is hereunto annexed.

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid

rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

63 *Petition for Writ of Error.*

To the Honorable Edward D. White, justice of the Supreme Court of the United States:

The petition of the Delaware, Lackawanna & Western Railroad Company respectfully showeth—

That the petitioner is a corporation of the State of Pennsylvania, and was during all of the year ending with the first Monday of November, 1899, engaged in the business of operating a railroad, or system of railroads, and also in that of mining anthracite coal in said State, and selling the same in said State and in other States, its business of selling coal requiring it to keep on hand in a number of other States large quantities of coal;

That in and during all of said year ending with the first Monday of November, 1899, your petitioner owned and had stored and on hand at Buffalo, New York, and Chicago, Illinois, and at other points outside of the State of Pennsylvania, coal held for sale at said points of the value of $1,702,443. which amount was included in the valuation of the petitioner's capital stock contained in its report of capital stock made to the auditor general as required by the laws of said State for the said year ending with the first Monday of November, 1899. The said auditor general, acting under alleged authority of the Pennsylvania acts of June 7, 1879, (P. L. 112), June 1, 1889, (P. L. 420), June 8, 1891, (P. L. 229), and June 8, 1893, (P. L. 253), in taxing your petitioner upon its capital stock for the said year ending with the first Monday of November, 1899, included tax upon its capital stock invested in and representing the said coal on hand in other States outside of Pennsylvania;

That the tax on capital stock imposed upon corporations by the laws of the State of Pennsylvania has been decided by the
64 highest court of that State to be a tax upon the corporate property and assets;

That your petitioner appealed from the said account to the court of common pleas of Dauphin county, Pennsylvania, to No. 213 Commonwealth docket, 1900, in said court, and with its said appeal filed, *inter alia*, the following specifications of its objections to the legality of the tax, viz:

"1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction.

The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them can be so construed, they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

"2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interests in railroads and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

"11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893,
under which said tax is claimed, cannot, nor can either of
65 them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them are to be so construed, then they or any or either of them are in violation of the necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

"12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits."

That upon the trial of the case an agreement in writing was entered into between the parties, whereby the question of liability of

the petitioner to tax upon the said coal, or upon its capital stock represented thereby, was withdrawn from the jury and reserved for the determination of the court, said agreement, which was made part of the record, being as follows:

"And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,443, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, the judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21 being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent., either of the parties
66 to be at liberty to file exceptions to, and appeal from the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874."

The depositions of Fred. F. Chambers and W. H. Truesdale attached to and made part of said agreement contain, *inter alia*, the following:

"Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law, to be appraised for taxation,

was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such point. The said coal when shipped from Pennsylvania was destined to said points in other States with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold the proceeds are returned to the company's treasury in the city and State of New York.

"In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after, its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.

"Although the Delaware, Lackawanna and Western Railroad Company was originally chartered under the laws of Pennsylvania, it has received authority to transact business and hold land in New Jersey and also transact business and hold land and have its general office and place of business in the city and State of New
67 York, said authority having been granted by special acts of the legislature- of said States. It is also authorized, by virtue of a special act of the General Assembly of Pennsylvania, to maintain its general office and place of business and hold its stockholders' meetings in the city of New York and to have as president, directors, and other officers, non-residents of the State of Pennsylvania. In pursuance of authority conferred by legislative enactments of the said two States, the company's general office and place of business, including its treasury, is, and was in 1899, and for ma-y years prior thereto, located at No. 26 Exchange place, in the city of New York. Its president, secretary and treasurer and other general officers are non-residents of Pennsylvania and reside in the city of New York or its vicinity, and have their offices in the company's general office at No. 26 Exchange place, as aforesaid."

That at the trial of the case in said court of common pleas of Dauphin county, your petitioner also submitted, *inter alia*, the following point, viz.:

"4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

That after full argument, the said court of common pleas of Dauphin county directed judgment to be entered in favor of the

Commonwealth of Pennsylvania, and against your petitioner, upon the said reserved question, overruling the said specifications of objection and refusing the said point, and finding tax to be due the Commonwealth of Pennsylvania upon your petitioner's capital stock invested in and representing said coal on hand in other States.

That the court of common pleas of Dauphin county subsequently overruled exceptions filed by your petitioner to its action in not sustaining the aforesaid specifications of objection and in refusing the said point, and judgment was entered in favor of the Commonwealth and against your petitioner in said court.

68 That your petitioner thereupon took an appeal from the said judgment of the court of common pleas of Dauphin county to the supreme court of Pennsylvania, to No. 18, May term, 1901, of the middle district of said court, and amongst its assignments of error in the said supreme court included the overruling of its exceptions to the action of the court of common pleas of Dauphin county in not sustaining the four specifications of objection above stated and in refusing the above point;

That the said cause having been fully argued in the supreme court of Pennsylvania, that court, upon the 9th day of July, 1903, affirmed the judgment of the court of common pleas of Dauphin county;

That the supreme court of Pennsylvania in which said cause was heard and decided is the highest court of record and the court of last resort, in the Commonwealth of Pennsylvania;

That the judgment of the said court is final;

That the judgment of the said court, as already shown, involved the decision of Federal questions; that said decision is in favor of the validity of the State law and against the immunity claimed by your petitioner under the Constitution of the United States;

Wherefore, your petitioner (presenting herewith a bond, with security, for approval) prays that a writ of error may be allowed to the said supreme court of Pennsylvania to bring up the record to the Supreme Court of the United States for correction, in that which violates the constitution and laws thereof, and that the citation to the defendant may accompany the same; and it will ever

69 pray, &c.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By its attorneys, M. E. OLMSTED,
A. C. STAMM.
WALTER W. ROSS,
General Attorney.

Endorsement: In the Supreme Court of the United States.—Delaware, Lackawanna & Western Railroad Co., plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error.—Petition for writ of error.—Filed in supreme court, Mar. 2, 1904, middle district.

70 *Writ of Error Bond.*

Supreme Court of the United States.

DELAWARE, LACKAWANNA & WESTERN Railroad Company, Plaintiff in Error, vs. COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.	In Error to the Supreme Court of Pennsylvania, Middle District. No. 18, May Term, 1901.

Know all men by these presents, that we, The Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, principal, and The Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact the business of indemnity and suretyship in the State of Pennsylvania, and having an office and principal place of business for the State of New York, at No. 35 Wall street, in the borough of Manhattan, in the city of New York, surety, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of nineteen thousand, seven hundred and sixty-seven and 42/100 dollars ($19,767.42), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated the twenty-ninth day of September, nineteen hundred and three.

Whereas, lately, in the court of common pleas in and for the county of Dauphin, judgment for nine thousand eight hundred and eighty-three and 71/100 dollars ($9,883.71) was entered against the Delaware, Lackawanna & Western Railroad Company at the suit of the Commonwealth of Pennsylvania, of Commonwealth docket, 1900,
No. 213, which judgment was afterwards affirmed by the su-
71 preme court of the State of Pennsylvania, in a certain plea and suit in said court of May term, 1901, No. 18, and the said Delaware, Lackawanna & Western Railroad Company have prosecuted or are about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment entered in the above entitled suit by the supreme court of Pennsylvania:

Now, the condition of this obligation is such that if the above named Delaware, Lackawanna & Western Railroad Company, plaintiff in error, shall prosecute its writ of error with effect and answer

all damages and costs if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By W. H. TRUESDALE, *President.*

Attest:

[Seal of Delaware, Lackawanna & Western Railroad Company.]

FRED. F. CHAMBERS, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HENRY B. PLATT, *Vice-President.*

Attest:

[Seal of Fidelity and Deposit Company of Maryland.]

JAMES R. KINGSLEY, *Attorney in Fact.*

Signed, sealed and delivered in the presence of:
CHARLES W. MARSH.
ERNEST L. HICKS.

Approved to operate on a supersedeas.

EDWARD D. WHITE,
Associate Justice.

Washington, Feb'y 15th. 1904.

72 STATE OF NEW YORK, } ss:
County of New York, }

On the 29th day of September, in the year 1903, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him the said Henry B. Platt.

(S'g'd)
[NOTARIAL SEAL.]

ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"Resolved, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or
73 "Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh "M. Allwood and James R. Kingsley, attorneys-in-fact of this "company, in the State of New York, be, and each of them is, hereby "authorized and empowered to sign, execute and deliver any and "all bonds or undertakings for or on behalf of this company, and to "attach thereto the seal of the corporation, the same to be at- "tested by the said George Sewell Bonner, attorney of the company, "or by either one of the other persons above named, as occasion "may require."

COUNTY OF NEW YORK, ss:

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 29th day of Sept., 1903.

JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement December 31st, 1902.

Resources.		Liabilities.	
Real estate	$670,000 00	Capital stock	$2,000,000.00
Stocks and bonds	2,723,100.00	Surplus and undivided profits	2,876,233.57
Railroad bonds	2,059,600.00	Premium reserve	717,297.87
Net premiums due	102,807.25	Claims in process of adjustment	31,012.45
Cash in bank, etc	235,058.63	Claims reported	166,021.99
	$5,790,565.88		$5,790,565.88

74 STATE OF NEW YORK, }
County of New York, } ss:

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition

of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

(S'g'd) JAMES R. KINGSLEY.

Subscribed and sworn to before me this 29th day of Sept., 1903.

ERNEST L. HICKS,
[NOTARIAL SEAL.] *Notary Public, New York County.*

Endorsement: Supreme Court of the United States.—Delaware, Lackawanna & Western Railroad Company, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error.—Bond.—I approve of the within undertaking, and of the sufficiency of the surety therein.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defen- at error of the right, at any time, to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. (S'g'd) E. Henry Holcombe, U. S. circuit court.—Fidelity and Deposit Company of Maryland, 35 Wall street, New York.

75 *Certificate.*

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

In testimony that the foregoing, contained on pages one to seventy four inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity of the State of Pennsylvania, in the case lately depending therein, to No. 18 May term 1901, middle district, wherein The Commonwealth of Pennsylvania was plaintiff below and appellee and The Delaware, Lackawanna & Western Rail Road Company was defendant below and appellant, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this seventh day of March A. D. 1904.

{Seal of the Supreme Court of Pennsylvania, Middle District, 1776.}

WILLIAM PEARSON,
Prothonotary of Supreme Court, Middle District.

76 In the Supreme Court of the United States, —— Term, 1904.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY
vs.
COMMONWEALTH OF PENNSYLVANIA.

Sur writ of error by the Delaware, Lackawanna & Western Railroad Company to the supreme court of Pennsylvania.

Assignment of Errors.

1. The learned court erred in not sustaining the company's first exception to the decision of the court of common pleas of Dauphin county, viz:

"1. The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz:

"'1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them do they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

2. The learned court erred in not sustaining the company's second exception to the decision of the court of common pleas of Dauphin county, viz:

"2. The learned court erred in not sustaining the second objection specified in defendant's appeal, said objection being
77 as follows, viz:

"'2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly contemplate the taxation of railroads, interest in railroads, and railway

equipment, real estate, tugs, barges, coal, or any other propery located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

3. The learned court erred in not sustaining the company's fourth exception to the decision of the court of common pleas of Dauphin county, viz:

"4. The learned court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

"'4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective pro portions of capital stock invested in and out of the State, and is, for that reason, in violation of section 1 of article IX. of the constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States.'"

4. The learned court erred in not sustaining the company's fifth exception to the decision of the court of common pleas of Dauphin county, viz:

"5. The learned court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

78 "'11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits.'"

5. The learned court erred in not sustaining the company's sixth exception to the decision of the court of common pleas of Dauphin county, viz:

"6. The learned court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

"'12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States await-

ing sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits.'"

6. The learned court erred in not sustaining the company's seventh exception to the decision of the court of common pleas of Dauphin county, viz:

"7. The learned court erred in its answer to the third point submitted by defendant, said point and answer thereto being as follows, viz:

"'3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.'"

"Answer: 'Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.'"

7. The learned court erred in not sustaining the company's eighth exception to the decision of the court of common pleas of Dauphin county, viz:

"8. The learned court erred in its answer to the fourth
79 point submitted by defendant, said point and the answer thereto being as follows, viz:

"'4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

"Answer. 'Refused for reasons given in the general opinion.'"

8. The learned court erred in not holding that the taxation by the State of Pennsylvania of coal mined within the State and shipped into other States and there stored for the purposes of sale is in violation of article I., section 8, clause 3, of the Constitution of the United States, which provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

9. The learned court erred in affirming the judgment of the court of common pleas of Daulphin county in favor of the Commonwealth of Pennsylvania and against the Delaware, Lackawanna & Western Railroad Company.

10. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

To the honorable the judges of the Supreme Court of the United States of America:

The party prays for a reversal of the judgment entered against it in the supreme court of Pennsylvania for the reasons assigned above.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By its attorneys, M. E. OLMSTED,
A. C. STAMM.

WALTER W. ROSE,
General Attorney.

80 [Endorsed:] In the U. S. Supreme Court. Delaware, Lackawanna & Western Railroad Company, (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Assignment of errors. Olmsted & Stamm.

Endorsed on cover: File No. 19,268. Pennsylvania supreme court. Term No. 208. The Delaware, Lackawanna & Western Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed March 11th, 1904. File No. 19,268.